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COSUDE AGENCIA SUIZA PARA EL DESARROLLO Y LA COOPERACIÓN
European Movement in Serbia
Evropski pokret Srbija
UNIVERSITÄT BERN
REVIEW OF MUNICIPAL STATUTES
a chance to take advantage of all the possibilities offered by the new Law on Local Self-Government
msp
Municipal Support Programme
Program podrške opštinama

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FOREWORD

Switzerland has a long-standing tradition of autonomous municipalities and local self-government. A strong democracy and a strong economy call for a responsible and future-oriented participation of citizens and parties in local government. The Law on Local Self-Government also includes the instruments of referendum and citizens' initiative at the municipal level. As a Swiss citizen I recommend that municipalities make use of this possibility, since I know how important well-used referenda may be for a healthy political and democratic culture. At the same time, I want to emphasize that the municipalities in Serbia should find their own way to ensure a responsible and forward-looking participation of its citizens.

Switzerland consists of nearly 3,000 municipalities. The average size of the municipalities in each of the 26 cantons varies strongly, and therefore the Swiss municipalities can provide rich experience. In close consultation and cooperation with Serbian experts on municipality matters, a Swiss Team led by Professor Walter Kälin of the University of Bern as well as a Serbian Team headed by Professor Aleksandar Simić have elaborated a brochure providing an easy and practical entry point for policy makers and citizens in municipal matters. This brochure is the result of cooperation between Switzerland and Serbia in the legal area of local self-government as part of the activities of the "Municipal Support Program" in Central Serbia. The brochure will help the reader to focus on the essentials in the context of the new Law on Local Self-Government.

The Law on Local Self-Government assigns to the different municipal bodies their competences and furthermore delimits and defines the interaction among them. A smooth cooperation will facilitate the strategic management of the municipality and the execution of daily responsibilities. Serbia's political institutions and citizens should efficiently tackle the political, legal and economic transition. The legacy of the past must be overcome quickly and the municipalities should focus on their future development. A clear vision and well-designed objectives are the point of departure; the focus on the essential tasks ensuring sustained development as well as a continuous and constructive assessment of the performance of the municipal institutions will be the yard stick measuring progress in transition.

Switzerland will continue its "Municipal Support Program" and assist the partner municipalities in their specific needs for the reorganization of the municipal bodies and in their relationship with civil society.

Wilhelm Meier

Ambassador of Switzerland

INTRODUCTION

For ordinary citizens, the central government is often too distant from their daily life and unable to address their immediate problems. Instead, it is the local level of government that really matters for individuals and their families. They send their children to state-run schools in their village or town, use local roads and transportation, register important family events such as birth and death with the municipal authorities, and receive water and electricity from the municipality. This is why decentralization has become a world-wide trend in order to respond to the many failings of centralized government in a pragmatic and efficient manner. Thus, municipalities and other local governments are being strengthened in a growing number of countries on all continents.

The Republic of Serbia has joined this world-wide trend when, in 2002, it adopted the Law on Local Self-Government and granted important powers to its municipalities. The Law provides that municipalities must amend their municipal Statutes and bring them into line with the Law after this year's local elections. This small publication aims at assisting municipalities all over Serbia in this endeavour in two particularly important and complex areas:

- Part I
  deals with the powers, roles and relationships of municipal bodies. First, the powers, roles and relationships of these are described and analyzed in a more general way, and then specific proposals are set forth on how the municipal Statutes should be amended to address shortcomings and gaps in the existing legislation and Statutes. These proposals concern the exceptions to the principles that the sessions of the municipal assembly are public, the employment status of the president of the municipality, the status and role of the municipal council, and the issue of residual jurisdiction.
- Part II
  is devoted to the referendum and the citizens' initiative as envisaged by the Law on Local Self-Government. Here, these concepts that are new for Serbia are described in more detail using the experience of Switzerland as a framework and point of reference. Proposals forwarded are not replicating Swiss law but were developed after intensive consultations and discussions in order to adjust them to the specific context of Serbia. They may be incorporated into the municipal Statutes if municipalities wish to do so. Part II also contains important information regarding the protection of the right to referendum and initiative and the protection of electoral rights.

Not only do both parts analyze and expound on the relevant concepts and applicable legal provisions, but they also contain specific draft texts that may guide and inspire the municipalities when amending their Statutes.

This publication is the result of a small project undertaken by the Swiss-funded and Kraljevo-based Municipal Support Program (MSP) in Central Serbia. The work was done by two legal teams, headed by us from the Institute of Public Law of the University of Bern, Switzerland (Dr. Mengistu Arefaine and Ms. Mirjam Strecker, LL.M) and from the EMS, Belgrade (Mr. Dragan Vujčić and Ms. Marina Samardžić). Reports and draft proposals were discussed by participants from the MSP partner municipalities during two workshops on Mt. Kopaonik and revised in the light of these discussions.

We would like to express our sincere gratitude to all those who have contributed to the successful completion of this project, particularly to Ms. Miguel Misteli and her very able team from the MSP, SDC Belgrade and the Swiss Embassy, Intercooperation Bern and our staff without whose dedication this work could not have been undertaken.

Walter Kälin and Aleksandar Simić
Bern/Belgrade, August 2004

PART I
POWERS, ROLES AND RELATIONSHIPS OF MUNICIPAL BODIES

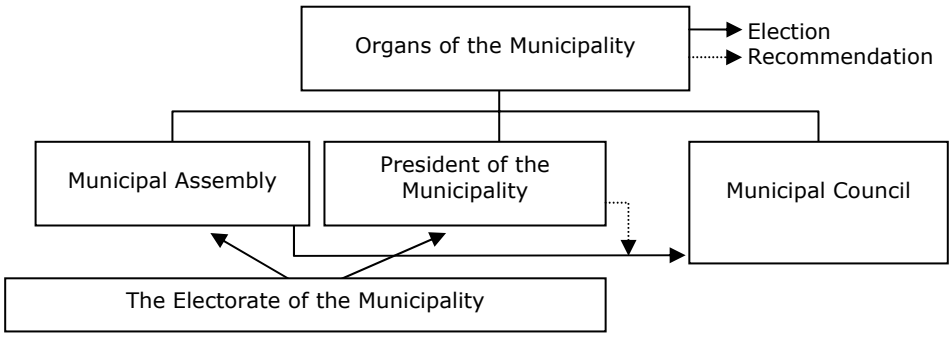
Introduction

by Dr. Mengistu Arefaine, the Swiss Legal Team

The Serbian Law on Local Self-Government of 2002 (hereafter: the Law) grants the municipalities the right to autonomously administer their own affairs that are of direct, collective and general interest for the local population. For this purpose, the Law specifies the different areas of jurisdiction where the municipalities can exercise their powers. Furthermore, the same Law lays down that the local self-governing units shall have original jurisdictions and that they will also exercise powers on such other tasks as may be delegated to them from the Republic.[1] The citizens of the municipalities can exercise such powers either directly or through their freely elected representatives.

The Law stipulates the type, the powers and the mode of election of the representatives of the citizens of municipalities. Furthermore, the Law broadly governs the (horizontal) distribution of powers among the organs of the municipality. At the same time, it leaves some discretion to the municipalities regarding the details of allocation of powers or functions which they can regulate in their respective Statutes according to their diverse circumstances. However, the problem is that the municipalities have not made use of this wide discretion assigned to them by the Republican Law. In many instances, the Law empowers the municipalities to clarify certain issues in their Statutes, but many municipalities have not done so. For instance, the Law says that a session of the municipal assembly should be public, and allows meetings closed to the public "for reasons of security and other reasons determined by the law *and the statute*" (Article 33 of the Law). Instead of specifying the reasons for making exceptions, some municipal Statutes literally repeated the text of the Law in their respective wordings. This is just one of the many areas where the municipalities have not made use of their power to legislate in issues left to their discretion by the Law. Such gaps may cause difficulties in the implementation of the principles adopted by the Law on Local Self-Government.

Gaps in municipal Statutes can also be observed in light of the role and power relationships of the organs of the municipality. According to Article 25 of the Law, the organs of the municipalities are the municipal assembly, the president of the municipality and the municipal council. What powers does each organ of municipality exercise? What role does each organ have in the administration of the municipality? What kind of relationship exists among the organs of the municipality? To discuss these issues, we will address the different organs of the municipality separately.



[1] Article 19 of the Serbian Law on Local Self-Government (hereafter: the Law).

Introduction

by Mr. Aleksandar Simić, Dragan Vujčić and Marina Samardžić, the European Movement of Serbia (EMS), the Serbian Legal Team

Local self-government in Serbia is part of the constitutional system of the Republic of Serbia, a member-state of the State Union of Serbia and Montenegro. The current Constitution of Serbia does not specifically guarantee the right to local self-government, but rather, in its introductory propositions, it establishes the municipality as a territorial unit in which local self-rule is realized. The fact that the right to self-rule, as a special right, specifically stipulated in Article 6 paragraph 4 of the former Constitution of the Federal Republic of Yugoslavia is not mentioned testifies to the deficiency of the current Constitution of Serbia and is only one in a series of reasons why a constitutional revision is required. Article 113 of the Constitution envisages the jurisdiction of the municipality, as the only territorial unit in which local self-government is realized. It is, however, specifically provided that the system of local self-rule is regulated by the Law. The Constitution allows that the Republic may delegate the performance of certain tasks to a certain municipality and that it also transfers the financial means for the performance of those tasks.

The regulation of local self-government was ensured by the adoption of a new Law on Local Self-Government in 2002. This Law introduced many novelties in comparison to the system that had been in force in Serbia until then. The bodies of local government, the manner in which they are elected, and the scope of their rights and responsibilities were altered. A system was introduced providing for the distribution of powers among such local governing bodies. The jurisdiction of the municipal administration was broadened. The setting up of special councils and other bodies which allow for the participation of citizens and their associations in the work of the local authorities was rendered possible. However, the complete regulation of the local self-government system within the municipalities themselves and the cities must be realized through the adoption of the Statutes and by-laws. The municipalities are obliged to develop, in their Statutes, the relevant legal principles regarding local self-government in a new way and regulate issues that have been assigned to their jurisdiction. These Statutes should, in many ways, be new documents, which, in a more specific manner than to date, ensure the implementation of the possibilities envisaged by the Law.

1. The Municipal Assembly

Comments by Dr. Mengistu Arefaine, the Swiss Legal Team

Nature and mode of election

The municipal assembly is a representative body and it performs the principal functions of the local government.[2] The municipal assembly shall comprise councillors whose number (prescribed by the Law to range between 19 and 75) shall be determined by the Statute of a municipality and who are elected for a four-year term by local citizens in direct elections, by secret ballot and in accordance with the Law and the Statute of each municipality. There are laws governing both the national and local elections. That means the Law on Local Elections of 2002 is binding on the municipalities as far as the election of the members of the organs of the municipality is concerned. In accordance with Article 26, para. 2 of the Law on Local Self-Government, the municipalities have discretion in governing, in their Statutes, some details with regard to the election of the members of the municipal council. According to Article 27 of the same Law, for example, the municipalities shall, within the limit of the Law, determine the number of the members of the municipal assembly. Pursuant to this Law, the Statute of the municipality of Kraljevo, e.g., fixes, in its Article 17, the number of assembly members at 70.

[2] Article 26 of the Law.

Powers/functions

The powers of the municipal assembly are listed under Article 30 of the Law and include activities like adopting a municipal Statute and the Rules of Procedure of the assembly, adopting the Annual Budget and Annual Account of the municipality, and so forth. The Law also envisages that the municipal assembly may pursue some other activities. However, such activities should be determined by the Statute of each municipality. Notwithstanding the fact that the municipal assembly may be assigned some other powers or functions, the Statutes of most municipalities do not grant more powers to their Assemblies than already envisaged by the Republican Law. During the workshops conducted within the framework of this project, participants from different municipalities said that the assembly already exercised enough powers and that it would be better to assign some functions to the municipal council.

Procedure of passing decisions

The municipal assembly shall pass decisions if the majority of the total number of councillors attends the session. The decisions of the assembly shall be passed by majority vote of the councillors present. But here again, Article 31 of the Law envisages that the Statute of a municipality may regulate such a rule otherwise. As far as the adoption of the Statute of a municipality is concerned, the Law already stipulates that a majority of the votes of the total number of councillors is required.

Procedure of convening and publicity of sessions

Assembly sessions shall be convened by the president of the assembly as required, but the assembly must be convened at least every three months. The terms and conditions of the motion for convening an assembly session may be regulated by the Statute.

The sessions of the municipal assembly are to be public unless closed for some reasons, which is to be determined by the Statute. As mentioned above, many municipalities have not regulated this matter but have created ambiguities by literally repeating the text of the Law.

Establishment of permanent or temporary working bodies

The Law grants the municipal assembly the power to establish permanent or ad hoc bodies or working groups to deliberate issues falling under the jurisdiction of the assembly. It is very interesting to see that the municipalities have already made use of this discretion. In this regard, the municipality of Kraljevo is to be mentioned as exemplary. According to Article 27 of the Statute of Kraljevo, about sixteen permanent working bodies of the municipality were established. Such kinds of bodies include, *inter alia*, the Electoral Commission, the Commission for Housing Affairs, the Commission for Petition and Complaints, the Commission for the Protection and Development of the Environment, and the Commission for Combating Corruption.

President of the municipal assembly

The president of the municipal assembly is elected for a term of four years by the assembly from among its members (councillors) and may be also dismissed by the same assembly. The president organizes the work of the assembly. He/she is also responsible for convening and chairing the session of the assembly, and performs all other duties assigned to him/her by the Law and the Statute of the respective municipality. There is also a *deputy president* who represents the president. The assembly should also have a *secretary* (who is to be a law-degree holder) to manage professional affairs related to the convening and holding of assembly sessions. The secretary shall be elected by the assembly at the proposal of the president of the assembly.

The Municipal Assembly

Comments and Proposal by Mr. Aleksandar Simić, Marina Samardžić and Dragan Vujčić, the European Movement in Serbia, the Serbian Legal Team

The municipal assembly is a representative body of all citizens living in the municipality. The citizens of the municipality are represented by assembly members elected in general, direct and regular elections every four years. Exceptionally, in emergency situations, these elections may be held more frequently. The Law stipulates the minimum and the maximum number of assembly members, and within that framework, the municipalities may determine the number of assembly members in their Statutes. As far as the incompatibility of functions is concerned, the Law establishes the condition that a person elected as member of the assembly may not perform the tasks of an employee within the municipal administration during his term in office. During that time the rights and obligations of an employee of the municipal administration are suspended. This provision sets out the definite incompatibility of the function of the assembly member with the exercise of the right to work in the municipal administration.

An assembly member may not be elected by the municipal assembly to hold some other offices. In case of the violation of this principle, a conflict of interest of the employee (appointed or elected) may arise with the obligation to represent the interests of the citizens of a certain electoral unit. This means that an assembly member may not be a member of the municipal council.

The municipal assembly is convened to decide on issues and tasks referred to in Article 30 of the Law on Local Self-Government only if a session is attended by a majority of the total number of the elected members of the municipal assembly.

In many municipal Statutes, the issues pertaining to the holding of sessions are insufficient and are not specified. The basic principle on the basis of which sessions are convened and decisions reached should be regarded in relation to the principle of the publicity of their work. The term publicity is understood to mean that an assembly session is attended by journalists and other reporters of the media. The assembly session should also be open to all the citizens interested in the work of the assembly. In the latter case, this may not be possible due to the lack of space and for other reasons.

We believe that the following model of statutory standardization could be appropriate for clearly defining the resolution of this issue:

Proposal

A summons containing the agenda of the assembly is delivered to the assembly members, the president and the deputy president of the municipality, the members of the municipal council and public media operating in and covering the territory of the municipality. The summons is delivered at least 72 hours prior to the session for the purpose of informing the public.

The assembly session may be attended by the president, the deputy president of the municipality and the members of the municipal council.

An assembly session is also attended by the authorized representatives of those making proposals as well as interested groups of citizens, to whose representative the president of the assembly is to deliver the call for the convening of a session at least 72 hours prior to holding the assembly session.

The session of the assembly is attended by public media representatives as well as interested citizens. They may not be allowed to attend the sessions under the following conditions:

- If their attendance is not possible for technical reasons; or,
- If their attendance disturbs the holding of the session of the assembly.

Closed sessions

Exceptionally, the assembly may decide for to hold a session behind closed doors for security and other reasons envisaged by the Statute of the municipality as reasons for closing the session to the public.

The Statutes of the municipalities do not clearly define the reasons for closing the assembly session. In this regard, we propose that the municipal Statutes are amended as follows:

The municipal assembly may decide to hold certain sessions behind closed doors for reasons of security and defence of the country, safeguarding state and military secrets, as well as for the purpose of protecting public morale.

The proposal for closing an assembly session to the public may be forwarded by the president of the municipality, the president of the municipal assembly, as well as by one-fourth of the total number of the assembly members. The proposal must be submitted in a written form.

The decision to close a session of the municipal assembly to the broader public is made by majority of votes of the total number of the representatives present.

The municipal assembly has a president who, in accordance with Article 36 of the Law on Local Self-Government, organizes the work of the municipal assembly. This means that *the president of the municipal assembly* is authorized to convene sessions of the municipal assembly, chair the sessions and perform other tasks determined by the Law and the Statute of the municipality. Legal administrative activities related to work, scheduling and conducting of assembly sessions and its working bodies, as well as administrative activities management in connection with the functioning of the assembly and its representatives - are achieved by municipal secretary.

2. The President of the Municipality

Overview by Dr. Mengistu Arefaine, the Swiss Legal Team

Nature and mode of election

According to the Law, the president of the municipality, who cannot be a councillor of the municipal assembly, shall be elected for a term of four years directly by the citizens through a secret ballot. The president is entrusted with the executive power of the municipality. The president shall, with the approval of the municipal assembly, appoint his deputy who shall replace him/her in the event of absence or when unable to perform his/her duties.

In European countries this model is apposed by those who think that the President should be elected by Municipal Assemblies (indirect election).

Indirect election

One argument in favour of indirect election is the reference to the low political maturity of the citizens at the local level. Such election gives an opportunity for easy manipulation of the electorate during the election process. First of all, the low turnout of voters calls into question the legitimacy of the directly elected president of the municipality. Another point of argument in favour of indirect election of the president of the municipality is that a president who enjoys the political support of the majority of the municipal assembly is more likely successfully to discharge his/her duties than a president who has the assembly against him even if he is supported by a majority of the voters.

Direct election

The arguments in favour of the system of direct election (which is the present model according to the Law) underscored that the direct election of the president of the municipality increases the number of choices regarding the future of the municipality because of competition among the candidates. Direct election also enhances the transparency of the election process and responsibility of the president of the municipality. This is because he/she would be directly answerable to his/her electorate. In the case of indirect election, the president of the municipality may avoid responsibility by hiding behind the majority of the municipal assembly who elected him. Direct election gives independent candidates, who are not affiliated with any political party, the opportunity to run for municipal presidency.

Relationship with the municipal council

The president of the municipality, as an executive body of the municipality, has some relations to the municipal council. *Firstly,* according to Article 43, para. 3 of the Law, the deputy president of the municipality is a member of the municipal council by virtue of his office. *Secondly,* the president of the municipality shall chair the session of the municipal council. *Finally,* under Article 44, para. 4 of the Law, the municipal council is obliged to assist the president of the municipality in the performance of some other activities that fall within the jurisdiction of the president of the municipality.

Powers/functions

According to Article 41 of the Law, the president of the municipality shall represent and act on behalf of the municipality and is also entrusted with the direct implementation of the decisions and other acts of the municipal assembly. The same Article of the law envisages that the president of the municipality may also perform other activities that may be conferred to him under the Statute of the municipality and other municipal acts. That means the municipalities may assign additional powers to the president of the municipality. That can be done by incorporating such powers into the Statute of the municipality, or the municipal assembly may, through its acts, empower the president of the municipality to perform some other activities that have not been specified in the Law.

Not only does the president of the municipality have the power to represent and act on behalf of the municipality; but he is also responsible for the implementation of decisions and other acts of the municipal assembly as well as for ensuring that responsibilities delegated from the Republic to the local governments are carried out.

Termination of the mandate

Article 42, para. 1 of the Law lists six different reasons that may cause the termination of office of the president of the municipality before the end of his/her tenure. The termination of the tenure of the president of the municipality shall be established by the ministry in charge of local self-government on the basis of documents confirming the reasons for such termination, including a statement by the municipal assembly. If the tenure of the president of the municipality is terminated before the end of his 4-year term, the president of the municipal assembly shall discharge her/his office until new president takes office. The president of the Republican Assembly schedule the election for the new president of the municipality if six months have elapsed after the termination of the tenure of the outgoing president and the municipality has not staged such election.

The Law also stipulates that the president of the municipality may be recalled from his office, through an initiative, before the end of the term for which he/she was elected. The initiative to recall the president may be launched by:

- a minimum of 10 percent of the electorate,
- by a majority vote of the total number of councillors of the municipal assembly, and/or

- the government of the Republic if it deems that the tasks are not performed in accordance with the law.

The electorate, directly and in secret ballot, decides on any initiative to recall the president of the municipality.

The President of the Municipality

Comments and Proposal by Mr. Aleksandar Simić, Marina Samardžić and Dragan Vujčić, the European Movement in Serbia, the Serbian Legal Team

The new Law on Local Self-Government establishes a system which has its equivalents in some political and constitutional set-ups where much power is concentrated at the highest level of the governmental organization. On the basis of the provisions regulating executive functions in the municipality, it is obvious that the Law strengthens the mono-cephalic executive power through direct election by the citizens of the municipality, a wider range of activities and broader jurisdiction, as well as by way of assigning greater responsibilities. The president of the municipality is the holder and representative of the executive power. According to Article 40 of the Law on Local Self-Government, the president of the municipality has the executive power. The president is elected for a period of four years, directly by all the citizens who reside in the territory of the municipality, and during that time he may perform no other functions. In accordance with the aforementioned principle of the separation of power, the president of the municipality cannot be a member of the municipal assembly. The president of the municipality puts up members of the municipal council and chairs sessions of the council. But the president of the municipality does not participate in the passing of its decisions. The president of the municipality, as the holder of the executive power, directly executes the decisions and other regulations of the municipal assembly and is also responsible for ensuring that such decisions and regulations are enforced by other bodies or departments. He/she makes sure that the tasks that are delegated from the Republic or are under the jurisdiction of the municipality based on its territorial autonomy are properly executed. The president of the municipality also performs other tasks which are directly connected to the executive function and, *inter alia,* represents the municipality.

Employment status of the president of the municipality

The respective Statutes of the municipalities should regulate the legal employment status of the president of the municipality and his deputy. The president of the municipality and his deputy should be employed on a full-time basis in the municipality. Thus, many dilemmas over the responsibility and interest of the executive power holder in the operation of the municipality as a whole will be avoided. Conflicts of interest may be eliminated at least on the formal level. Such kind of regulation also avoids the possibility that the president and his deputy work on the so-called voluntary basis which could be a source of the abuse of powers and corruption. Therefore, we put forth the following amendment to the Statutes of the municipalities:

Proposal

The president of the municipality and his deputy are full-time employees of the municipality. The legal status of the employment of the president and his deputy will be regulated by a special decision or by-law of the municipal assembly.

3. The Municipal Council

Overview by Dr. Mengistu Arefaine, the Swiss Legal Team

Nature

The provisions of the Law are not very clear with regard to the nature of the municipal council. The Law simply provides the following: "The municipal council shall be a body coordinating the functions of the president of the municipality and the municipal assembly and shall exercise a controlling/supervising function over the work of the municipal administration."[3] The council is designed to function mainly as a link between the legislative and executive bodies. The council is also related to the municipal administration. To that effect, the Law lays down that the municipal council shall rule on the conflict of competencies between the municipal administration and various enterprises, organizations and institutions or citizens.[4]

Mode of election

With regard to the election of the municipal council the Law stipulates that the municipal assembly shall, through a majority vote of all councillors, elect members of the council upon the recommendation of the president of the municipality.[5] The council, which shall comprise a maximum of eleven members, shall be elected for a term of four years. The members of the council may be dismissed from office at the proposal of the president of the municipality or a minimum of one-third of the councillors (municipal council).[6] As far as the mode of election and functions of the municipal councils are concerned, the Law does not grant any discretion to the municipalities. For this reason, the Statutes of the municipalities have adopted the same provisions as provided for in the Law. But there are discussions over two models of the election of the members of the municipal council.

1. The first model would allow the president of the municipality to elect all members of the council. This model could be justified by the fact that the council is more related to the executive than to the legislative body of the municipality.
2. The second model envisages, as a compromise between the current system and model 1, which the president of the municipality should recommend the members of the council to the municipal assembly which then decides on the recommendation.

According to the second model, the municipal assembly should, however, be obliged to accept at least half of those recommended by the president of the municipality. This gives the executive body an opportunity to choose members of the council whom he/she knows well and the president, in such cases, will also have confidence that the council would be able efficiently to discharge its duties. This contributes to a smooth relationship between the president of the municipality and the municipal council.

Powers/functions

Under Article 44 of the Law, the powers of the municipal council include as follows:

1. Drafting decisions on the budget of the municipality,
2. Supervising the activities of the municipal administration,
3. Annulling or rescinding municipal administration acts that are not in conformity with the Law, Statute and other general acts or decisions rendered by the municipal assembly,
4. Rendering decisions in second-instance administrative proceedings on the rights and responsibilities of residents, enterprises and institutions and other organizations from the municipality's primary jurisdiction,

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3 See Article43 of the Law.
4 See Article60, Para. 1 of the Law.
5 See Article43 of the Law.
6 Ibid.

5. Assisting the president of the municipality in the performance of other activities within his/her jurisdiction.

Some criticism has been voiced that the functions of the municipal council are very limited and therefore some functions of the municipal assembly should be assigned to the council. In particular, functions relating to the activities of the Board of Directors of various public enterprises should fall under the powers of the municipal council. However, this would be contrary to the applicable Law which makes it clear that there is no possibility of altering the powers of the council. These discussions indicate that there might be a need to redefine and clarify the role of the municipal council in the Law.

The Status and Role of the Municipal Council

Comments and Proposal by Mr. Aleksandar Simić, Marina Samardžić and Dragan Vujčić, the European Movement in Serbia, the Serbian Legal Team

According to the new Law on Local Self-Government, the municipal council is a new body placed between the municipal assembly, as the representative body, and the president of the municipality, as the executive body. The same could be said of its jurisdictions. Contrary to the executive committee which, in the previous laws on self-government, had the legal status of an executive body, the municipal council does not have that position. The very position of the council and its legal status are not clear enough. While the position of the president of the municipality is defined in the Law as the body performing the executive function, the municipal council is described in Article 43 as "a body co-coordinating the functions of the president of the municipality and the municipal assembly and (having) a controlling/supervising function over the work of the municipal administration". This is also an executive function, but it is not stated as such in the Law. It is probably the consequence of the manner in which the body "got into" the wording of the Law. Namely, the municipal council is a body which is the product of the amendments to the Bill submitted in order for it to be adopted by the National Assembly.

The amendment introducing the municipal council into the text of the Bill had not been proposed by the Government, but rather the opposition. That is why its "hybrid" function is visible. Thus, in the final wording of the Law, the municipal council mars the pure model of the division of authority at the municipal level, as it was conceived by the drafters of the Law. Its mediating role was well-conceived, but at the moment it remains unclear as to how this role can be realized in practice.

Election of council members

According to Article 43, the president of the municipality puts up members of the municipal council to the municipal assembly. This means that, on the one hand, the members of the council should have the support of the executive body, this being the president of the municipality, in order to be eligible at all and on the other, they must have the support of the members of the municipal assembly, that is, the representatives of the majority of the assembly, for without their vote they cannot be elected. This manner of selection of the members of the municipal council reflects a special character of this body: its members must, at the same time, have the trust of both the executive and representative body in the municipality. This, after all, is natural, as the council is supposed to reconcile the two bodies in the event of conflicts. However, this renders the selection of the members of the council and the performance of their functions more difficult. It is not easy to earn the trust and receive the support of the majority of assembly members in situations where the president of the municipality is elected as a member of one party and the majority of the members of the assembly are from another political party or coalition of parties. Still, the very process of electing the members of the municipal council can be a test which shows whether the executive and legislative powers of the municipality are able to function properly. However, the provision that the municipal assembly has the decisive role in the selection of the members of the municipal council is significant. Article 43, para. 5 stipulates that if the proposals of the president of the municipality for the election of

members of the municipal council has been rejected twice by the assembly, the latter can, through majority vote of its members, propose and elect members of the municipal council. In that case, the municipal council will have a member or members who do not enjoy the support of the president of the municipality, but only that of the assembly, and who, despite of that will have to work on the "reconciliation of the functions" of the president and the municipal assembly. Whether they will be able to do so in this case remains to be seen in the practical enforcement of the Law.

Proposal

During discussions, the Swiss team proposed as a possible solution that would contribute to the stabilization and strengthening of the local governing bodies that the president of the municipality should put forth a single list of candidates for the members of the municipal council and that the assembly must approve at least half of the nominated candidates from the list.

Tasks of the municipal council

According to Article 44 of the Law on Local Self-Government, the municipal council performs four tasks, some of which are of an executive character:

- Defines draft budget decisions,
- supervises the work of the municipal administration — it can abolish or cancel the decisions of the municipal administration which are not in accordance with the Law, the Statute or other decisions of the municipal assembly,
- decides in the second instance on administrative proceedings on the rights and duties of the citizens, enterprises, institutions and other organizations from the original jurisdiction of local self-government.
- The municipal council also performs other tasks defined under the Law. In accordance with Article 44, para. 4, the municipal council assists the president of the municipality in the performance of the tasks from his sphere of competence. The Law, however, does not identify the tasks.

Thus, the question arises as to whether all the tasks referred to in Article 41 of the Law on Local Self-Government are those of the president of the municipality, or is it some of them which must then be precisely defined by the municipal Statutes. This is not clear especially when considered in connection with Article 41 of the Law which does not enumerate all the tasks of the president of the municipality. Article 41, para. 9 sets out that the president of the municipality also performs "other tasks determined by the Statute and other regulations of the municipality." In any case, prior to the possible amendment to the Law itself, the Statute of the municipality must, among other things, resolve this issue.

The implementation of the Law on Local Self-Government in the wake of this year's local elections will provide the municipalities with experiences from the practical enforcement of the normative regulations regarding the status and role of the local governing bodies and their interrelationships. Then, all the advantages and disadvantages of the system of the division of power at the local level as well as the possibilities for the survival of the municipal council as the body performing the reconciliation function will become clear.

Proposal

The role of the municipal council should be strengthened in relation to the authority of the president of the municipality and the municipal assembly. We do not see a reason why the municipal council should not be allowed to decide on setting and regulating municipal taxes on municipal services, determining the working hours of catering, craft and trade facilities, etc. These competencies are currently exercised by the assembly.

Qualified and competent people should be included in this body which should have the character of an expert and advisory body. Members of this body should be in charge of individual departments, i.e. the structure of public services of the municipality should be

covered by individual departments. The president of the municipality or the president of the municipal assembly is to be their immediate superior to whom they should answer for their work. The foregoing tasks are to be added to the solutions and competencies of the municipal council as they are currently defined in Article 44 of the Law. Article 44, paragraph 4 should be further elaborated in terms of other tasks in which this body should assist the president of the municipality. In any case, no matter whether these tasks are regulated by the Statute or the Law, they need further elaboration and enumeration. Article 43, paragraph 3 should also be further elaborated in terms of the manner in which this body performs its role of the coordinator of the functions of the president of the municipality and the municipal assembly. This mediating role of the council is a good concept, yet it is still unknown as to how it can be realized. The mechanisms for the realization of this role are obscure.

4. Residual Powers

Overview by Dr. Mengistu Arefaine, the Swiss Legal Team

As already described above, the powers of the municipality are normally to be exercised through the three organs of the municipality. That means the various competencies of the municipality must be exercised by at least one of its organs and the Law grants the municipalities enough discretion to decide on the details of the distribution of powers among their different bodies. However, a look at the ways of power distribution followed by the municipalities shows that not all powers of the municipality are assigned to one of the three organs of the municipality. This leads to the gap in power distribution, i.e. some competencies of the municipality would remain unexercised because of the lack of a clear distribution of powers among the three organs of the municipality. To avoid such gaps, the Statute of the municipality should specify for all powers which organ exercises which power. In addition, it would be useful for the municipal Statute to designate one of the organs of the municipality as the body competent to exercise residual powers, i.e. powers that are not specifically allocated to any one of the organs of the municipality.

Swiss allocation of powers

For example, Swiss experience with regard to the system of the allocation of powers of the organs of the municipalities is:

- That powers are allocated in such a way that no gap remains in the exercise of powers at the municipal level in the first place. This is the result of the complete or exhaustive way of allocating the powers of the municipality among its organs.7

According to the experiences of the Swiss municipalities, the president of the municipality, as an executive organ, is entrusted with the residual powers. This means that the president of the municipality can exercise all powers of the municipality that are not assigned (through the rules and regulations of the federal government, the cantons or the municipality) to other organs of the municipality. Such an exhaustive way of the allocation of powers avoids gaps that may otherwise be created with new developments. Whenever a new issue arises relevant for administering the municipality that was not foreseen during the enactment of the Statute, it will automatically fall within the powers of the president of the municipality. Otherwise, such a new development would require the amendment of the Statute in order to determine which organ of the municipality would be responsible for the new event or development. There is an important exception to this: If the new event or development needs to be regulated by law, it automatically falls within the power of the municipal assembly. It is only with regard to those activities related to the administration of the municipality that the executive organ is empowered to act according to the residual

7 See, for example, Article 25 of the Law on Municipalities (Gemeindegesetz) of the Canton of Bern. It is mentioned again at the municipal level (see Article 93 of the Statute of the city of Bern). See also Article 52 and Article 97 of the Laws on Municipalities of the Cantons of Schauffhausen and Solothurn respectively.

competency. Another important issue with regard to the residual competency is the difference between the responsibility to execute and the actual execution of some activities that fall within the residual competencies. This is because the president of the municipality, for example, may be responsible for all residual powers. But he/she may also further delegate some of the powers to other organ(s) of the municipality or other body or department within the municipality to actually execute them. The president of the municipality in this case, however, remains always responsible for their execution.

In Serbia, it would be important that the municipalities adopt such a system of allocation of powers among the organs of the municipality. One organ must be provided with the residual powers. It may not necessarily be the president of the municipality. It can be any other organ of the municipality according to the realities of each municipality. But usually the executive organ is suited to such responsibilities. This is because the executive organ is attached to the daily activities of the municipality and can effectively respond to new developments without unnecessary delay.

Proposal

The reality shows that such a principle has not yet been adopted in the municipal Statute although there is a need for this. It seems, that in the specific context of Serbia, the municipal council would be best suited to exercise residual power related to the administration of the municipality for several reasons:

1. the municipal council has very limited competencies;
2. the president of the municipality would be loaded if the residual powers were also added to his/her competency, and
3. the executive is represented in the municipal council insofar as the president of the municipality is the chairperson of the session of the municipal council and thus can play an important role in this regard.

Residual Jurisdiction

Comments and Proposal by Mr. Aleksandar Simić, Marina Samardžić and Dragan Vujčić, the European Movement in Serbia, the Serbian Legal Team

The issue of residual jurisdiction, that is jurisdiction over the resolution of tasks that have not been allocated to any municipal body by either the Law or the Statute of the municipality, is an important issue that should be clarified when implementing the Law on Local Self-Government and drafting new municipal Statutes. Through the consistent regulation of this issue, confusions and ambiguities as to the competencies of the bodies of local self-government can be avoided. To that end, the Law is to determine which organ of the municipality is responsible for the undesignated (residual) responsibilities. But this is not the case as far as the Law on Local Self-Government is concerned. Because it has many undefined provisions like: "performs other tasks prescribed by law and the statute." For this reason, it is absolutely necessary that the municipal Statutes clarify what remains unclear at the level of the Law.

During the workshops conducted in the course of this project, most of the opinions were in favour of the idea that the tasks or activities not assigned to any of the municipal bodies must be allocated to the municipal council as residual jurisdictions. Arguments for such a stand lie in the fact that the president of the municipality, as the executive body, has a wide scope of competence and that to assign him new ones would only further strengthen his already strong position. On the other hand, the municipal assembly is a massive representative body of citizens that meets very rarely and passes decisions slowly. As matters on the local level often need to be addressed with some urgency, the assembly would not be the appropriate body for the residual powers. But if the municipal council is to be entrusted with residual powers, it is important first to clarify and resolve the issue of the status of the municipal council in the structure of the local governing bodies and its relationship with the holder of the executive power, i.e. the president of the municipality.

Residual jurisdictions in Switzerland are assigned to the president of the municipality as the executive body. This means that the president of the municipality has all the powers have not been assigned to other bodies of the municipality. The president of the municipality may quickly pass an urgent decision on issues that have not been previously resolved and may also efficiently enforce such a decision. In that case, the principle of efficiency prevails over the principle of legitimacy, regardless of the fact that the president of the municipality is also a body whose legitimacy is not questioned, for, in Switzerland, he is frequently elected by the representative body — the local assembly. If the said argument is accepted in our premises, our president of the municipality could also, as the body elected by all the inhabitants of the municipality by a direct vote, perform all of the residual responsibilities.

Proposal

To our opinion, a provision in a municipal statute could define that all residual powers aught to be allocated to **Municipal Council** or **municipality President** depending on the prevailing Assembly will on municipal statute adoption.

5. Other Organs and Bodies of the Municipal Assembly

Comments and Proposal by Mr. Aleksandar Simić, Marina Samardžić and Dragan Vujčić, the European Movement in Serbia, the Serbian Legal Team

5.1. Organisation of Construction Land Management

Construction land management should be organized in one of the following manners:
- By establishing an enterprise for construction land management,
- By establishing an independent organization,
- By integrating these activities with other jobs that are performed on the local level, primarily the utilities,
- By integrating all or some of public utility services into one enterprise comprising independent sectors of which only one would practice construction land management.
- By organizing these duties within the framework of the municipal administration.

Taking the Law on Local Self-Government as the basis for regulating this area at the level of local self-government, general and individual acts of local self-government units tackle these issues. However, owing to their importance, it is also necessary to define in greater detail actions that the bodies are to undertake in regard to these issues and their mutual relationship. Namely, municipal statutes envisage, among other issues, that a municipality through its organs and in accordance with the Constitution and the Law, regulates execution and development of communal activities and adopts the programs of construction land arrangement, regulates and provides for the execution thereof and determines compensation rates to be charged from land users.

The choice of the manner of the organization of construction land management should be the result of understanding the content and the character of the tasks the execution of which should be provided for.

5.2. Public Enterprise

A public enterprise for providing municipal services is founded by the assembly of a local self-government unit.

The Law on Municipal Services defines the municipal services as those of public interest. This Law refers to a set of duties determined as municipal services under the applicable regulations. On the basis of the foregoing, these duties include:
- water purification and distribution,
- water purification and draining water from the atmosphere
- vapour and hot water production and supply,

- public transportation,
- city/municipal waste collection in cities and towns within a municipality, and
- all other duties that are vital for the daily life of citizens in the territory of a municipality.

In order to have these duties performed, public enterprises for the production and supply of vapour and hot water, public transportation in cities and suburbs, etc. were set up in municipalities and cities in the Republic of Serbia.

Regulation of some domains which belong to the original responsibility of the municipalities is the task executed in order to secure public interest. The performance of these duties must be adequately supervised by the bodies of local self-government units. Bearing in mind the specific quality of these tasks, their adequate implementation cannot be ensured only through the bodies of the municipal administration. The municipality should, however, also seek suitable solutions through the establishment of links with other organizational bodies — public enterprises.

According to the applicable Law on Public Enterprises and Performance of Duties of General Interest (The Official Gazette of the Republic of Serbia, issue 25/2000), the municipality may found a public enterprise for the execution of work of public/general interest for the local community for whose territory it is established. In that case, the sources of funding are: certain compensations and other local public revenues.

In terms of authorizing the municipal assembly to regulate issues that are necessarily regulated through contracts on entrusting it with the implementation of municipal services, Article 8 of the Law on Public Enterprises and Performance of Duties of General Interest should be consulted.

5.3. The Role of the Municipal Manager

In regard to construction land management, it should be pointed out that a significant role in this area is played by a new institute established under Articles 55 and 56 of the Law which stipulates that municipal managers perform the following duties as part of their job, and in particular:

- Propose projects that foster economic development and meet citizens' needs,
- Encourage and coordinate investments and attract capital,
- Encourage entrepreneur initiatives and the creation of a combination of private and public arrangements and partnerships,
- Initiate amendments to change and improve regulations that hamper business initiatives.

The activities of municipal managers in the foregoing fields would make possible the timely preparation of construction land for development and encourage investments for these purposes.

Such a position of the municipal manager implies that the person in charge of these duties should be competent and experienced as well as capable of performing such important entrepreneur tasks mainly in the area of economic nature. With this in mind, the essential question arises as to whether people with such qualifications and abilities would be motivated enough to be involved in these activities solely for the sake of improving the general state of affairs in the municipality and for the salary offered within the municipal administration, while putting aside interests of their own enterprise/company and their personal interests.

Proposal

In view of the above, it is more purposeful to regulate this role insofar that it be entrusted to an association comprising entrepreneurs with the proven track record, experience and expertise in similar tasks and duties. Another important issue arises and this being that the manner of work and criteria according to which these people are to be selected should be

clearly and specifically identified within the framework of regulations that would be the legal frame for this institute.

5.4. Managerial Instruments for Urban Land Use

Spatial and zoning plans are the most adequate means for managing construction land because these plans guide the development of a particular area by defining the conditions under which building will be conducted on individual lots. Apart from this method of land management, it is important to mention land policy as a set of measures whereby the community may wield influence on land development.

If one analyses the practice, it may be inferred that the local authorities would, for the sake of attaining their own goals, make a step forward in this field by establishing particular non-profit making organizations at the local community level with this as their sole task.

In the course of solving these issues, significant improvement would be made by specifying the tasks of the bodies of local self-government and their mutual links and distribution of duties. This should be based on their position according to the Law on Local Self-Government and the Statutes of the municipalities.

5.5. Municipal Architect

According to Article 54 of the Law on Local Self-Government, an architect may be appointed in a municipality. His scope of work is clearly defined under this Article of the Law.

The municipal architect performs, *inter alia*, the following tasks:
- Puts up initiatives for drawing up regulation and zoning plans, as well as amendments thereto,
- Issues instructions on designing architectural projects with the aim of protecting architectural assets and preserving the environmental values of individual urban areas and facilities,
- Cooperates with institutions for the preservation of immovable cultural property and natural assets of particular value and performs other tasks related to the zoning development of the environment.

In view of the foregoing, a self-government unit would, through a more detailed definition of these issues and mutual cooperation between municipal bodies, lay the ground for increasing the offer and development of construction land according to the developmental policy of the municipality.

6. Relationship between Local Self-Government and Civil Society

Comments and Proposal by Mr. Aleksandar Simić, Marina Samardžić and Dragan Vujčić, the European Movement in Serbia, the Serbian Legal Team

Cooperation between local self-government and civil society, i.e. non-governmental organizations, differs from one municipality to another. That difference is clearly seen in the degree of the development of the civil sector as well as in the readiness of local self-government to establish and develop ties with the civil sector. In some smaller municipalities, the civil sector is undeveloped or practically non-existent. In larger municipalities where the circumstances are somewhat better, that cooperation is insufficient and confronted with many prejudices and mistrust. Namely, some environments still believe that the basic role of the non-governmental sector is to criticize the municipal authorities and exert pressure against the local administration without bearing any responsibility whatsoever.

Such an attitude partly arises from the misunderstanding of the role of civil society in modern society. Thus, civil society is not regarded as a possible local resource or contribution and a sector that may strongly support the local self-governing authorities in the exercise of its competencies by contributing its human resources and, above all, experience.

However, after the democratic changes, the readiness for cooperation has increased as has the desire for improving the relationship between civil society and local self-government. In some municipalities and cities, the representatives of civil society are members of municipal working bodies and the managing boards of public enterprises. Some municipalities have also considered the possibility of setting up bodies for cooperation with civil society (the Civic Forum).

The talks held with the representatives of local self-government and local non-governmental organizations pointed to the importance of the presence of international non-governmental organizations. That their presence is important is testified to by their contribution to the development of civil society primarily in local environments, as well as the different approach of local self-government to cooperation with civil society. The presence of international non-governmental organizations greatly contributed to increasing professionalism in the operation of local non-governmental organizations. It is inferred that their presence is still necessary. It was also pointed out that the municipalities that can afford it should ring fenced funds in their budgets to be provided as financial support to local non-governmental organizations, particularly in projects that are of immediate importance for local self-government. Naturally, financial support to civil society would be defined in accordance with clear-cut criteria and based upon specific programs and projects. It is our opinion that the municipalities are willing to cooperate with civil society in all domains.

Proposals

We believe that all municipalities should set up councils for cooperation with civil society comprising representatives of civil society and local administration management. These working bodies should be established by the presidents of the municipalities. At the same time, they would be in charge of and responsible for the quality, intensity and level of cooperation with civil society. These working bodies should be the link between civil society and local self-government.

An alternative is to have the working bodies established by the municipal assemblies, i.e. to elect members from civil society and local self-government. The election procedure and the scope of work should be stipulated by the Rules of Procedure of the municipal assembly. Apart from this body, and as part of the second alternative, the presidents of the municipalities could establish committees for cooperation with civil society as advisory bodies that could assist the president in his/her work.

PART II
REFERENDUM AND CITIZEN'S INITIATIVE

by Mirjam Strecker, the Swiss Legal Team

Introduction

The Law on Local Self-Government of the Republic of Serbia of 2002 (hereafter: the LSG) provides for two new instruments of direct democracy at the municipal level: the referendum and the citizens' initiative. Although the LSG contains some basic provisions on the referendum and initiative, the municipalities are to regulate in detail in their Statutes how these important instruments of direct democracy are to be applied. The following contribution will assist the municipalities in drafting their Statutes.

Section one draws on the Swiss experience with instruments of direct democracy. After some preliminary remarks on the Swiss system of municipalities, this section provides an overview of the concept of citizens' participation and clarifies some notions that are often used in this context. It then focuses on the referendum and the citizens' initiative. Based on an analysis of recent Swiss legislation at the cantonal and municipal levels, the section then goes on to explain the issues to be regulated in the relevant legal texts. The presentation is restricted, however, to those questions that may be of interest for the Serbian municipalities.

Section two examines the relevant provisions of the LSG, identifies the issues that need to be regulated in the municipal statutes regarding the referendum and the citizens' initiative, and presents concrete proposals for legal texts that may inspire the municipalities when amending their Statutes.

1. Notions, Concepts and Swiss Experience

1.1. Preliminary Remarks on the Swiss Municipalities

1.1.1. The position of the municipalities in the Swiss governmental system

Switzerland is a federal state composed of 26 cantons that are, at least in principle, sovereign. The Swiss Federal Constitution guarantees the cantons the autonomy to regulate the organization of their territory according to the principles of the Federal Constitution and other federal laws. This autonomy includes the regulation of local self-governance. Therefore, each canton has — besides its constitution — its own law on municipalities.

While the sovereignty of the cantons is expressly mentioned in the Federal Constitution, the same principle does not apply to the municipalities. Their political organization and the areas of their jurisdiction depend on the cantonal laws. The cantons define, in their respective laws on municipalities, the different tasks of the municipalities, their political organization as well as the citizen's political rights[8]. The 26 existing cantonal laws on municipalities, however, differ one from the other. While some cantons grant their municipalities a large area of discretion, others prescribe in detail the municipalities' competencies as well as the manner in which these powers are to be exercised. This diversity leads to a situation in which some cantons regard their municipalities as mere administrative units whereas others leave them such a high degree of autonomy that the municipalities almost become a sort of mini-states.

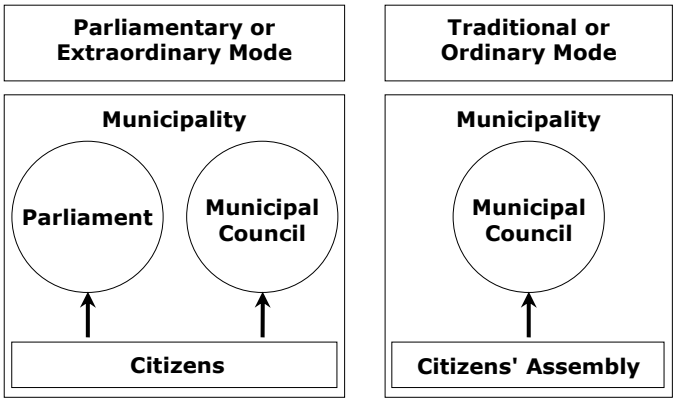
[8] Political rights of the citizens are often regulated in the Cantonal Constitution as well as in a special cantonal (or sometimes municipal) "Law on Political Rights".

1.1.2. The internal organization of the Swiss municipalities

All Swiss municipalities have at least one legislative and one executive body. As far as the legislative body is concerned, the cantonal laws, in most cases, provide for two different models: a traditional or ordinary and an extraordinary or parliamentary model.[9]

In the *traditional or ordinary* model, there is no representative body, e.g. no parliament. The legislative body is formed through the general meeting of all the citizens, which means that it is congruent with the electorate. The citizens normally exercise their powers in the municipal assembly at least twice a year. This model is considered as the most direct form of democracy, because all citizens can actively take part in political debates and in the decision-making processes over matters concerning the municipality.[10]

In the *extraordinary or parliamentary* model, the legislative body is formed by a parliament composed of members elected by the citizens of the municipality (the electorate). This model of indirect democracy is often complemented by a variety of additional instruments of direct democracy, mainly in the form of referenda or initiatives, which allow the citizens actively to take part in important policy-making decisions. This combination of a system of representative democracy with instruments of direct democracy is often called 'semi-direct democracy'.



Generally, the extraordinary model is suitable for large communities. The minimal number of citizens required for opting for the parliamentary model varies from canton to canton, ranging from 300 to 2,000 residents[11]. Today, one-fifth of the Swiss municipalities (comprising the majority of the Swiss population) have a parliamentary model.[12]

1.2. Initiative and Referendum in a Broader Context of the Citizens' Participation[13]

The possibilities of the citizens' participation at the municipal level can be manifold. Here, three categories of citizens' participation mechanisms shall briefly be described in order to make it possible to explain the function of the initiative and referendum in the context of other participation mechanisms.

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9 SÉBASTIEN MICOTTI/MICHAEL BÜTZER, Die Gemeindedemokratie in der Schweiz: Übersicht, Institutionen und Erfahrungen in den Städten 1990 - 2000, Centre d'études et de documentation sur la démocratie directe, c2d, Université de Genève, 2003, pp. 25.

10 The ordinary model does not, however, exclude other instruments of direct democracy such as initiative and referendum besides the municipal assembly.

11 MICOTTI/BÜTZER (note 9), p. 27.

12 MICOTTI/BÜTZER (note 9), p. 27. Some cantons of the French-speaking part of Switzerland (which are influenced by the French political tradition) allow only the parliamentary model (even for the smallest municipalities).

13 The following classification draws on MICOTTI/BÜTZER (note 9), pp. 34.

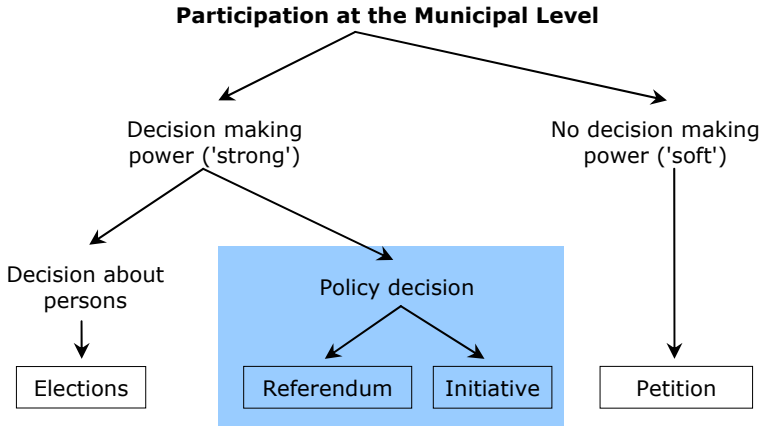
The term 'participation' includes all mechanisms for citizens to get into formal contact with the local government, ranging from rather 'soft' mechanisms such as the right to petition, to 'strong' mechanisms, providing the citizens with the right to take certain decisions.

- 'Soft' mechanisms are channels through which the citizens can raise their 'voice' *without any binding character* for the municipality. The right to *petition* is an example of such mechanisms. It provides the citizens with the right to address their concerns and their ideas to the municipality and with the right to receive an answer from the municipality. Apart from the duty to provide an answer of any kind, the municipality has no other obligation.
- Strong mechanisms, in contrast, provide the citizens with a right to *participate in the decision-making processes*, by making use of their right to vote. Such decision-making power can either relate to electing a person to a particular office (e.g. the president of the municipality), or voting on a legal act (e.g. an amendment to the municipal Statute) or a specific decision (e.g. changing the name of the municipality):
    - In the first case, we refer to *elections.* In a pure representative system, this is normally the only decision-making power vested in the citizens[14]. This means that by the act of election, the citizens transfer powers to rule to their representatives.

  But what happens, if the elected representatives — during their respective tenures — render important decisions or enact laws that are contrary to the interests of the citizens? Or what happens if the representatives fail to render decisions or enact laws that would be of great interest for the citizens?

    - In these cases, the instruments of the referendum and initiative provide the electorate with additional safeguards, as they secure the citizens' direct participation in the decision-making processes on important issues. With the people's *referendum*, the citizens may — under certain conditions — challenge a decision taken by a municipal body (normally the parliament) and demand that it is submitted to a popular vote. With the instrument of the citizen's *initiative*, in contrast, the citizens may request that their own proposal is submitted to such a vote, even if the elected representatives are opposed to it.

  If a political system provides for either the referendum or the citizens' initiative, the power to rule is thus not completely transferred to the elected representatives, but is shared amongst the elected representatives and — though exceptionally — the citizens.



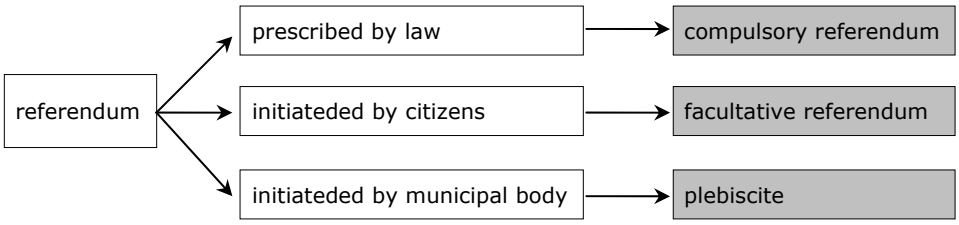
[14] In some cases, such systems also allow citizens to vote about the removal of elected representatives from their offices.

1.3. The Referendum: Notions and Functions

The referendum is an instrument empowering the citizens to *sanction or reject a decision* taken by a municipal body, normally the parliament, by popular vote.

The function of the referendum differs according to who has the right to introduce the process leading to a vote by the citizens.

- In its most extensive form, the referendum is prescribed by law, i.e. the municipal Statutes or the cantonal law on municipalities, and defines some issues that are in any case subject to the referendum with no special initiation by citizens being necessary. Decisions on those issues can only be adopted by approval through the electorate. This kind of referendum is called *compulsory referendum*. Its function is to ensure the effective citizens' participation with regard to particularly important issues so as to reach the highest possible degree of legitimacy.
- We refer to a *facultative referendum* if a certain part of the electorate can introduce it by collecting a sufficient number of signatures. In this case, the referendum is primarily an instrument of the *retrospective control* of the decisions rendered by the elected representatives, as a group of citizens can initiate a process aimed at preventing the representatives from passing a decision that does not have the support of the majority of the electorate. In addition, the institution of the referendum also plays an important *preventive part* insofar as the representatives, while rendering their decisions, will anticipate the danger of a referendum and therefore will not easily adopt a solution that would clearly not be supported by the majority of the electorate. Therefore, the referendum is often said to be a conservative instrument as it normally aims at keeping the status quo.
- Sometimes, the municipal bodies may decide by themselves whether they want to put a decision to the citizens' vote or not. If they do so, we speak of a *plebiscite.* Here, the function is fundamentally different from the above mentioned peoples' referendum, as the participation of the electorate remains restricted to cases where the competent municipal body expects the voters to approve its decision. Thus, the referendum serves purely political goals such as gaining legitimacy for a disputed decision or teaching the opposition a lesson. Plebiscites are indeed quite prone to be misused for political manipulation.



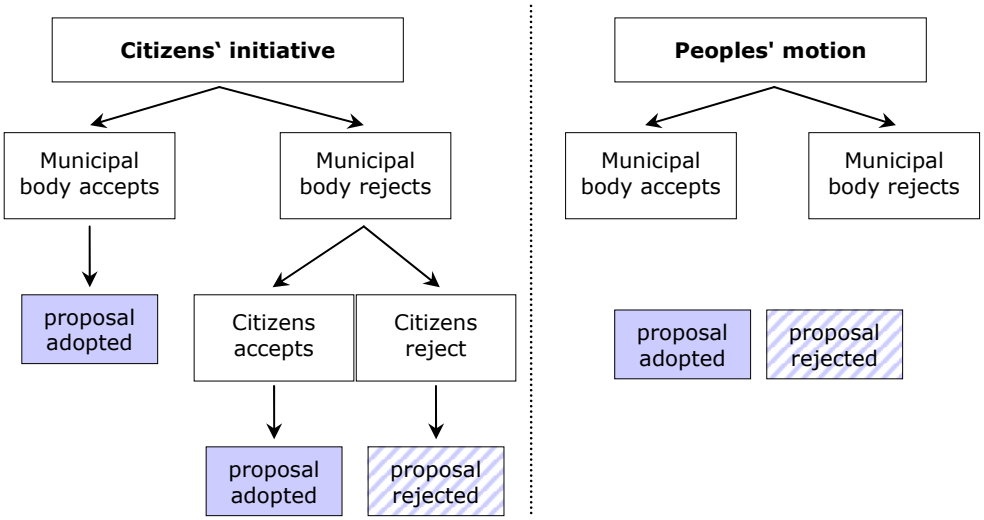
1.4. The Initiative: Notions and Functions

The initiative is an instrument empowering the citizens to propose the enactment of a law or a decision to a municipal body — normally the parliament — and to demand that the proposal is submitted to a vote by the citizens if the municipal body concerned does not accept the proposal. Thus, the proposal will be adopted either if the respective municipal body or the majority of the electorate accepts it.

The initiative is the second pillar of direct democracy, complementing the referendum and conferring to citizens an *active role* in municipal politics. It is the classical instrument enabling the electorate to impose a *change to the status quo* regardless of whether a local authority has passed a decision or not and even against the will of the local authorities.

All Swiss municipalities with the parliamentary model are familiar with this kind of an institution, even though its scale varies greatly from canton to canton and even among municipalities of the same canton.

The initiative which includes the right to have the citizens' proposal submitted to the vote of the citizens in case the municipal body does not accept it, must be distinguished from what is called the *citizens' motion* which also allows citizens to forward a proposal to the competent municipal body but where there is no popular vote if the municipal body rejects the proposal.

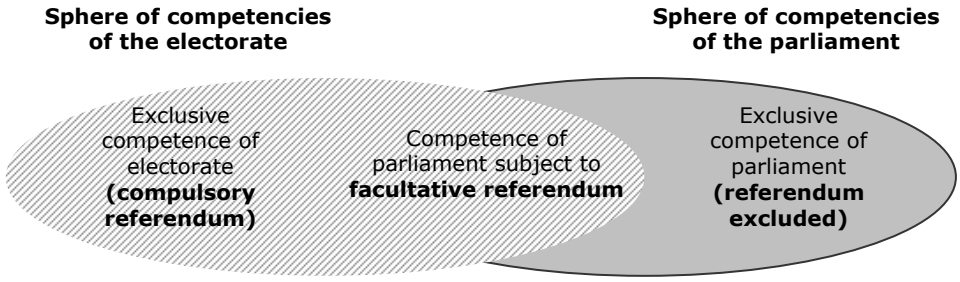


1.5. The Referendum: Issues to be specified by Law or Regulation

For the referendum to become operational, several issues must be specified by law (e.g. in the Law on Municipalities or in the municipal Statutes). These issues will be described in the following sub-sections.

1.5.1. Subject matter of the referendum

There is a need for provisions clarifying what issues are or may be subject to what kind of referendum: These provisions should clearly state what kind of decisions are within the exclusive competency of the municipal assembly, which ones can only be taken by the citizens on the basis of a compulsory referendum and what decisions adopted by the assembly enter into force only if no facultative referendum is demanded by the required number of citizens. Without such clarification, meaningful participation is hardly possible as the authorities could decide from case to case and according to political considerations whether they want citizens' participation or not.



- Subject matter of the *compulsory referendum:* The issues subject to a compulsory referendum in the Swiss municipalities are always enumerated expressly in the cantonal law or the municipal Statutes. For example, in all the municipalities that are familiar with this kind of instrument, at least the adoption and the amendment of the municipal Statutes are subject to the compulsory referendum. With regard to other issues, however, there are big differences among the Swiss municipalities.
- Subject matter of the *facultative referendum:* Traditionally, only decisions of the parliament are subject to the referendum. Recently, however, some municipalities provide for a facultative referendum even against decisions of the executive. There are two different techniques to regulate this issue:
    - Mostly, the Statutes *enumerate* those matters that are subject to the facultative referendum. This enumeration may comprehend broad categories, e.g., "all general acts (by-laws) adopted by the parliament, decisions about expenses exceeding [a certain amount], decisions about the tax-rate", etc.
    - The scope of the facultative referendum can also be determined applying a *general clause* referring to all acts of the parliament (exclusive of those that are subject to the compulsory referendum). In this case, however, some exceptions have to be stated, because for some acts of parliament a referendum is simply not appropriate. This is the case, e.g., for minor financial decisions, for elections, for decisions that are predetermined by higher legislation with no leeway for the municipality, for disciplinary decisions, for by-laws that regulate internal matters and for decisions that have been adopted in the context of a legal dispute.

  The decision as to which issues should be subject to the facultative (or even compulsory referendum) is a highly political one. In general, the citizens should have at least the possibility to participate in the decision-making of those issues that are of great importance for the majority of them. Regarding the legal technique for regulation, the enumeration seems to be the appropriate means for cases where the citizens' participation by referendum will be limited to certain cases only whereas the use of a general clause seems to be the most suitable way as the citizens will be enabled to participate in a broad range of municipal affairs.
- Subject matter of *plebiscites:* As it is an attribute of the plebiscite that it is in the discretion of the municipal bodies to decide whether they want a plebiscite on a certain issue, there is no need for any specific regulation. It is sufficient to mention that the municipal bodies can decide to put any issue to the peoples' vote and to define the requirements for such a decision (e.g. the majority of the municipal parliament).
- *Publication* of issues subject to the compulsory or facultative referendum: For all issues that are subject to the *compulsory* referendum, the parliament must be obliged to provide the citizens with the relevant texts including a short and objective commentary in order for the citizens to be informed when voting for or against the proposal. The electorate must also be informed about the decisions passed by the municipal bodies that are subject to the *facultative* referendum. Otherwise, the facultative referendum would make no sense. The Swiss laws prescribe therefore that decisions that are or may be submitted to the referendum must be published and that, in the case of the facultative referendum, the possibility to collect signatures for such referendum must be indicated.

1.5.2. Method of initiation and requirements for the collection of signatures

The relevant legal texts must clearly specify who has the right to initiate the process of a popular vote. Is it a certain number of citizens (facultative referendum)? Or is it a municipal body (plebiscite)? Or both? And: how many citizens' signatures are required? Respectively, what quorum within the municipal body is required in the case of the plebiscite?

- The signatures required can be defined as a *percentage* of the electorate (e.g. 5% or 10% of the electorate) or as a *fixed number* (e.g. 5,000) with the latter being more predictable and practicable for those wanting to stage a referendum. "Fixing the number of signatures required entails *balancing competing values*: on the one hand the

considerations of cost saving and of the quality of initiative and referendum proposals, and on the other, the need to keep the process open to minorities which are not adequately represented in parliament or government"[15]. In the Swiss municipalities the number of signatures required varies from 5% to 20% of the electorate.

- Regarding the majority required in the case of a plebiscite, a choice has to be made as to whether the plebiscite should be an instrument for the majority of the respective body (normally the parliament) or whether a minority should be allowed to ask for a peoples' vote. As the second case bears the danger of systematic blockade of the political system by the minority, it is not to be recommended. In order to limit the possibilities for misuse of the plebiscite, it makes sense to require even a qualified majority, e.g. two-thirds of the members of the respective body for putting an issue to the poll.

Furthermore, for the facultative referendum, the *period of time* within which the signatures have to be collected must be limited. In the Swiss municipalities this period ranges from 30 to 60 days[16]. The *beginning of the period* is normally stated to be the date of publication of the decision subject to the referendum.

Finally, the *signature collection procedure* has to be regulated in detail in order to prevent abuses and forgery of signatures. For more details in this regard, see 1.6.2. below.

1.5.3. Realization of formal requirements and the procedure for conducting the peoples' vote

Once the signatures have been collected, somebody must be competent to declare whether all formal requirements have been met, particularly whether a sufficient number of signatures have been collected and whether these signatures are valid or not, or whether the time period for collecting them has been respected, etc. In the Swiss municipalities, the *competence for the verification of these formal requirements* lies normally within the executive body.

In order to prevent the authorities from delaying the vote, Swiss municipalities generally provide for a certain time period within which the peoples' vote must be conducted, ranging from 1 to 10 months after the submission of the required number of signatures.

Last but not least, the procedure of the vote as well as the protection of the right to vote must also be regulated (see below, contribution by M. Samardžić, at 2.3).

1.6. The Initiative: Issues to be Specified by Law or Regulation

1.6.1. Scope and content of the initiative

Normally, the *issues open to the initiative* are congruent with those issues that are open to the referendum or they form a selection from the latter.

Technically, the subject matters are defined either through *enumeration,* (*e.g.* building, demolition and acquisition of municipal buildings, projects relating to municipal streets, municipal planning etc.), or by *general clause***,** referring, e.g. to the scope of the referendum or to the competencies defined (e.g. "all matters subject to the compulsory or facultative referendum" or "adoption, amendment and abolishment of by-laws or decisions within the competence of the electorate or the parliament").

With regard to the *content*, all Swiss municipalities provide for two different forms of initiative, depending on their content. An initiative contains either a *general suggestion* (i.e. a general political request, e.g. the introduction of gender quotas, which cannot be realized by a vote alone, but first needs to be translated into a concrete proposal for implementation), or a specific proposal (e.g. a formulated new legal provision). According to the principle of *"unity of form"*, a mixture of the two forms is not allowed. An additional

[15] GEOFFREY DE Q. WALKER, Initiative and Referendum: The People's Law, Australia, 1987, p. 133.

[16] In one canton, the time limit varies according to the size of the municipalities with a longer period for larger municipalities.

requirement is set by the principle of *"unity of matter"*. "This means that a popular initiative must refrain from combining different questions in one proposal, so citizens can express their preference on a single issue at a time. If an initiative should contain more than one issue it should be split up into separate initiatives that are voted upon individually"[17].

1.6.2. Method of initiation and signature requirements

Normally, a certain number of citizens may initiate the process of an initiative (citizens' initiative). Sometimes, however, a specified number of the members of parliament have the same right (parliamentary initiative). Like with regard to the referendum (see above at 1.5.2), the number of signatures can be determined as a percentage of the citizens or it can be a fixed number. In the Swiss municipalities the number of signatures required is usually fixed. Numbers are equivalent to a range from 5% to 30% of the registered voters of a municipality.

Not all municipalities provide for a specific *period of time for the collection of signatures*. In those municipalities that have set a time limit, the period varies between two and six months.

With regard to the *details of collection of signatures*, the municipal laws usually make references to the respective cantonal laws that govern the procedure of putting up an initiative at the cantonal level. Those technical provisions will not be expounded here. They have, however, been integrated into the proposals set out below (see 2.1.2).

1.6.3. Formal requirements and voting procedure

It is necessary to define the possible reasons for invalidity of an initiative and to designate the body responsible for taking the decision on the validity. In general, the Swiss municipalities provide for two categories of reasons for the invalidity of an initiative. On the one hand, invalidity for *formal reasons* which results from a breach of the principles of unity of matter and unity of form. On the other hand, the initiative may be invalid for *material reasons*, e.g. if its content is unlawful (i.e. when the initiative infringes the municipal laws or higher legislation), or when it is factually impracticable. In the main, the parliament is competent to declare an initiative invalid, but in some cases this competence may also lie within the executive.

In addition, the procedure to be followed after a citizens' proposal has been submitted must be regulated. Normally, the initiative is first discussed in the executive and then (together with a statement of the executive) transmitted to the parliament. If the parliament rejects the proposal, then the citizens will vote about the proposal. In case the parliament accepts the proposal, a peoples' vote is required only if the initiative is about an issue within the exclusive competence of the electorate.

If the initiative is in the form of a *general suggestion*, then there are different possibilities regarding the procedure: If the *parliament rejects* the general suggestion, the peoples' vote is compulsory. If the initiative is adopted by the electorate, then the parliament must translate the general suggestion into a concrete proposal. In some Swiss municipalities, a second vote (this time regarding the concrete proposal) will take place, while in others it is not required. If the *parliament accepts* the general suggestion, it is sometimes enabled first to convert the general suggestion into a concrete proposal. Then this concrete proposal is submitted to the peoples' vote (even if the initiative is about an issue within the exclusive competence of the electorate).

Moreover, the majority of the analyzed Swiss laws contain detailed provisions on time limits regarding the different stages of the procedure. Even if no time limit is set, the Swiss Federal Constitution guarantees a due time within which the initiative process should be finalized.

Finally, some Statutes provide for an obligatory *"clause of withdrawal"* which enables the initiative committee (i.e. the citizens initiating and organizing the collection of the

[17] WOLF LINDER, Swiss Democracy, 1994, p. 98.

signatures) to withdraw the initiative at any stage of the process until the vote takes place. This will provide the initiative committee with the possibility to react to the changes of political conditions.

2. Proposals

2.1. The Referendum

The LSG provides the following framework for the referendum at the municipal level:

> **Article 68 — Law on Local Self-Government**
>
> The assembly of a local self-government unit may on its own initiative call a referendum on issues within its jurisdiction.
>
> The assembly of a local self-government unit shall call a referendum on an issue within its jurisdiction at a request of the citizens of the local self-government unit, in the manner established by the statute and law.
>
> A decision put to referendum will be adopted if the majority of votes cast are in favour, provided that more than half of the total number of residents has voted.

Article 68 of the LSG prescribes *two kinds of referenda*: one introduced by the municipal assembly (Article 68, paragraph 1 of the LSG, *plebiscite*) and the other introduced by a certain number of citizens (Article 68, paragraph 2 of the LSG; *facultative peoples' referendum*). While the LSG contains some specific provisions on these instruments, there are some points that remain *unclear* (e.g. with regard to the issues subject to the referendum) or that are *not at all regulated* (e.g. the details regarding the facultative peoples' referendum and the voting procedures for both kinds of referenda). The municipal Statutes must try to clarify those points that are not clear and adopt their own provisions on those aspects that are not regulated by the LSG. These points will be discussed in the following sub-sections.

2.1.1. Issues subject to the referendum

As explained above (II-1.5.1), the Statutes should clarify the *issues subject to each kind of referendum*. At first glance, there seems to be no leeway in determining the issues subject to a referendum, as the law already prescribes that the referendum is admissible on *issues within the jurisdiction of the municipal assembly* (Article 68, paragraphs 1 and 2). However, a closer look at those issues (Article 30 of the LSG) shows that it cannot be the intention of the LSG to allow the referendum against *all* decisions taken by the municipal assembly: It makes no sense to allow a referendum against, for example, the opinion of the municipal assembly on the Republican, provincial and regional planning (Article 30, para. 16 of the LSG) or against the decision of the municipal assembly to call a municipal referendum, or against the declaration of an opinion on the proposals contained in citizens' initiatives and so on (see Article 30, para. 6). Paragraphs 1 and 2 of Article 68 are thus *unclear* with regard to this question. This is why it is important for the Statutes carefully to determine the issues subject to a referendum, thereby creating an exclusive sphere of competencies (see II-1.5.1 above) of the municipal assembly where no referenda are possible.

We suggest that the issues subject to the facultative referendum are *the same for both kinds of referenda* (be it introduced by the councillors or by the citizens). We prefer this to a solution that would allow a *plebiscite* on all issues within the jurisdiction of the municipal assembly while constraining the possibilities for a *facultative peoples' referendum* to a limited list of issues. In Switzerland, the extraordinary referendum exists sometimes, but is more seen as a political instrument than as a democratic right because it is often 'misused' to re-delegate the accountability for delicate decisions to the people. Because of the fact that it may be abused for the purpose of political manipulations, it would be advisable to limit the plebiscite as much as possible. Therefore, it can be recommended, on the one

hand, not to extend its field of application in comparison to the facultative peoples' referendum and, on the other, to hamper its initiation by requiring a qualified majority (two-thirds of the councillors) in the municipal assembly.

The following example for the regulation of the referendum contains two different alternatives for the definition of the decisions subject to the facultative referendum and the plebiscite. Alternative 1 follows the technique of enumeration while alternative 2 uses the technique of a general clause with exceptions (for more information about the two techniques see II-1.5.1 above).

Article 1 — The referendum

[1]The referendum is the legal process whereby the citizens of the municipality may approve or reject a decision of the municipal assembly.

PARA 2 — 4: Alternative 1 (enumeration)

[2]The municipal assembly may on its own initiative, by two-thirds of the votes of the councillors present, call a referendum on a decision pursuant to paragraph 4. of this Article (plebiscite).

[3]The municipal assembly shall call a referendum on a decision pursuant to paragraph 4 of this Article, if at least 10% of the citizens demand it within a time period of 60 days after the publication of the decision (facultative peoples' referendum).

[4]The following issues shall be subject to the referendum:

a) The adoption and revision of the municipal Statute and other legal provisions with the exception of the Rules of Procedure of the assembly;

b) the adoption and revision of town plans and development programs;

c) decisions regarding the name of the municipality, coat of arms and other municipal symbols;

d) decisions regarding the names of streets, squares, city quarters, hamlets, and other parts of towns and villages;

e) … [to be determined by municipality]

PARA 2 — 4: Alternative 2 (general clause with exceptions)

[2]The municipal assembly may on its own initiative, by two-thirds of the votes of the councillors present, call a referendum on one of its decisions (plebiscite).

[3]The municipal assembly shall call a referendum on one of its decisions, if at least 10% of the citizens demand it within a time period of 60 days after the publication of the decision (facultative peoples' referendum).

[4]The following decisions shall never be subject to a referendum:

a) Decisions about expenses lower than *** [fix amount];

b) Elections;

c) Decisions that are predetermined by higher legislation with no leeway for the municipality;

d) Disciplinary decisions;

e) Internal regulations.

As the LSG does not oblige the municipal assembly to publish its decisions, this must be provided for in the municipal Statutes, because if the citizens do not know about the decisions that have been adopted by the assembly, their right to introduce a facultative referendum will be useless. For the same reason, the citizens should receive the information necessary to initiate a referendum. The decision concerned shall not enter into force before the end of the delay for collecting signatures or the vote if enough signatures have been collected.

Article 2 — Publication and entering into force of decisions of the municipal assembly

[1]All decisions of the municipal assembly that are subject to the referendum shall be published in [to be determined by the municipality, e.g. the local television, the local radio, one or more public places in the municipality, an official journal, etc.[18]] and the possibility to raise a referendum including the absolute number of signatures required, the beginning and the end of the time available for collecting signatures and reference to the relevant provisions on the referendum in this Statute shall be indicated.

[2]Decisions of the municipal assembly subject to the referendum shall not enter into force during the period available for collecting the signatures or, if enough signatures have been collected, before the referendum has taken place.

2.1.2. Method of initiation and requirements for the collection of signatures

Article 68 of the LSG stipulates that the referendum may be initiated either by the municipal assembly or the citizens, but it specifies neither the quorum necessary in the municipal assembly nor the details regarding the citizens' signatures (number, mode of collection, etc.). The municipal Statutes should therefore regulate those issues.

With regard to the quorum necessary in the municipal assembly for the plebiscite, if the Statutes do not regulate anything, it will be the simple majority, as Article 31 of the LSG states that "decisions [of the municipal assembly] shall be passed by a majority vote of the councillors present, unless otherwise determined by law or the Statute". As there is a danger of political abuse of the instrument of plebiscite (see above at 1.3) it would be appropriate to introduce a quorum of two-thirds of the councillors (see the proposal made above for Article 1, para. 2).

As to the details regarding the citizens' signatures, the main challenge is how to provide a system that makes sure that signatures cannot be forged. The following provisions may provide a solution that is practicable in the Serbian context:

Article 3 — Initiating the facultative peoples' referendum

At least 51 citizens entitled to vote in the municipality may form a referendum committee and initiate the process of signature collection by depositing a list of signatures in the office of the ***[municipal electoral commission].

Article 4 — The list of signatures

The list of signatures shall contain:

a) The wording of the decision of the municipal assembly to be submitted to a referendum;

b) The date of the official publication of this decision;

c) The names and addresses of at least five members of the referendum committee;

d) The indication that only those entitled to vote in the municipality are allowed to sign the list and that each person can sign only once.

e) Reference to the penal sanctions contained in Article ***.

[18] It is important that the publication is done in a way that allows all citizens to have a chance to know about it.

Article 5 — Collection and verification of signatures

[1]The municipal administration designates one or more places where the list of signatures can be signed.

[2]Lists of signatures can be signed by voters registered in the municipality.

[3]Citizens shall sign two identical copies of the list of signatures in the presence of

a) a person of the municipal administration;

b) a representative of the referendum committee,

c) (in ethnically mixed municipalities according to Article 63 of the Law on Local Self-Government: for each ethnic community one representative of the council for inter-ethnic relations, or other persons designated by them.)

[4]Citizens shall place their name, date of birth, address and number of identity card on both lists in handwritten and readable form.

[5]The persons listed in paragraph 3 shall verify immediately the identity of the person who signed the list.

[6]One copy of the list of signatures shall be kept within the municipal administration. The other copy shall be kept with the representative of the referendum committee. The persons listed in paragraph 3 shall sign both copies of the lists of signatures every time before they leave the place where the signatures are collected.

2.1.3. Realization of formal requirements and the procedure for conducting the peoples' vote

The municipal Statutes should finally designate the body competent for the verification of the formal requirements and regulate the details of the procedure for conducting the vote. Since a decision taken by the electorate has the highest possible degree of political legitimacy, the municipal assembly should not be allowed to change such a decision immediately after the peoples' vote.

Article 6 — Procedures

[1]Upon the lapse of the period provided herein, the *** [municipal electoral commission] shall certify as to whether or not the required number of signatures has been obtained in accordance with the Law and the statutes. The certification shall be published in ***[the official journal].

[2]If the required number of signatures is obtained, the ***[president of the municipal assembly] shall set a date for the referendum within 90 days from the date of certification by ***[the municipal electoral commission].

[3]The referendum shall be held on the fixed date, after which the results thereof shall be certified and published in*** [the official journal] by the ***[municipal electoral commission].

[4]If the decision of the municipal assembly, which is subject to the referendum, is approved by a majority of the votes cast, provided that more than half of the total number of registered voters have voted[19], it shall enter into force 30 days after certification of the result of the vote by the ***[municipal electoral commission]. If it fails to obtain the required number of votes, the decision of the municipal assembly shall be considered null and void.

[19] This second requirement is not very wise in our view but provided for in Article 68, para. 3 of the LSG.

Article 7 — Modification of decisions

Any decision approved by the citizens as provided herein shall not be repealed, modified or amended by the municipal assembly within 12 months from the date of the referendum.

2.2. The Citizens' Initiative

Article 66 of the LSG stipulates the following:

Article 66

By citizens' initiative, citizens may propose to the assembly of the local self-government unit to pass an act that will regulate a particular issue within the primary jurisdiction, a change of statute or other acts and call a referendum in accordance with the law and statute.

The assembly shall hold a debate on the proposals specified in paragraph 1 of this Article, and give a reasoned reply to the citizens within 60 days of the receipt of the proposal.

The statute of the local self-government unit shall establish the number of citizens' signatures required for effective start of citizens' initiative, which may not be less than 10% of the electorate.

This instrument is called "citizens' initiative". However, at least in the Swiss terminology, an initiative comprises the right to obtain first a reply from the parliament and second, if the parliament does not accept the initiative, a vote by the citizens on the proposal advanced by the initiative. In this regard, the will of the people has precedence even if this is against the will of the parliament. This is the very essence of the initiative which distinguishes it from the "soft" participation mechanisms such as petition or "citizens' motion".

However, Article 66, para. 2 of the LSG does not oblige the municipal assembly to hold a popular vote if it rejects the proposal. This instrument can therefore be compared to the *"petition with a right to have a reply"* existing in all Swiss municipalities or at best with the *"citizens' motion"* mentioned above (see II-1.2).

However, Article 66, para. 3 of the LSG would not make much sense if one interprets the citizen's initiative in such a soft way. It is unlikely that the drafters of the LSG really wanted to restrict the right of citizens to approach the municipal assembly with a proposal and to receive an answer of any kind to such an extent, taking into account that to collect signatures of at least 10% of the electorate requires very considerable efforts. It is also unlikely that the citizens will use this instrument considering the apparent discrepancy between the effort and the possible return (only a mere reply of the municipal assembly). The question thus arises as to whether the LSG leaves the municipalities a discretion to go further and introduce the right of the citizens to have a peoples' vote on the issue in case the municipal assembly does not adopt the proposal. It is only then that the "citizens' initiative" would be an "initiative" in the Swiss sense of the term. As the LSG aims to leave the municipalities a broad autonomy in the management of their own affairs (see Article 3, para. 1 of the LSG) and as a broad interpretation of such an autonomy would strengthen democracy at the local level, the introduction of a 'real' initiative at the local level should not be considered as an infringement of the LSG.

In the following, we provide proposals for initiatives in the sense of a mere citizen's motion as well as for a "real" initiative.

2.2.1. Subject matter of the initiative

According to Article 66, para. 1 of the LSG, the citizens may suggest "...to pass an act that will regulate a particular issue within the primary jurisdiction, a change of the statute or

other acts and call a referendum". The wording of this Article is not clear, particularly as far as the *acts that will regulate a particular issue within the primary jurisdiction* are concerned. Is the initiative only about general acts, i.e. is it about 'lawmaking' (as opposed to concrete administrative decisions) or is it about a whole range of municipal activities provided for in Article 18 of the LSG? The fact that the initiative is not a convenient instrument for a lot of decisions to be made in the municipality (e.g. for appointments and dismissals of public officials) leads us to understand this wording in a narrow sense, i.e. to view the initiative mainly as an instrument for 'lawmaking'. Again, if the LSG is considered as a *minimum standard*, this understanding does not prevent the municipalities from *opening up* the initiative to other issues. Probably the most appropriate solution would be to provide that the issues open to an initiative are the same as those open to a referendum.

Alternative 1 (citizens' motion)

Article 1 — Citizens' initiative

[1]The citizens' initiative is the legal process whereby the citizens of the municipality may directly propose to the municipal assembly...

Sub-alternative 1: Initiative for 'lawmaking' issues[20]

...to amend the statutes or to adopt, amend or repeal any other law within the jurisdiction of the municipality.

Sub-alternative 2: Initiative congruent with referendum

...any issue that would be open to a referendum according to Article 1 para, 4 of these Statutes.

[2]The proposal shall be signed by at least 10% of the citizens within a period of 60 days from the starting date of the collection of signatures.

[3]If the municipal assembly rejects the proposal, no referendum shall be held.

Alternative 2 ('real' initiative)

Article 1 — Citizens' initiative

[1]The citizens' initiative is the legal process whereby the citizens of the municipality may directly propose to the municipal assembly...

Sub-alternative 1: Initiative for 'lawmaking' issues

...to amend the statutes or to adopt, amend or repeal any other general act within the jurisdiction of the municipality.

Sub-alternative 2: Initiative congruent with referendum

...any issue that would be open to a referendum according to Article 1, para. 4 of these Statutes.

[2]The proposal shall be signed by at least 10% of the citizens within a period of 60 days from the starting date of the collection of signatures.

[3]If the municipal assembly rejects the proposal, a referendum shall be held.

Article 1a — Proposal for new legal provisions

[1]The proposal for new legal provisions shall be in the form either of a general suggestion or a draft with specific wordings. A mixture of the two is not allowed (principle of unity of form).

[2]The proposal shall be limited to one topic within the jurisdiction of the municipality (principle of unity of matter).

[20] Other issues could be added, if desired.

2.2.2. Method of initiation and requirements for the collection of signatures

The following examples are quite similar to the respective provisions for the referendum, although there are some differences arising mainly from the fact that the initiative is not about a decision taken by a municipal body but brings a new issue onto the political agenda. There is a need to verify from the very beginning (before the commencement of the collection of the signatures) if the proposal complies with the requirements set out by the statutes, especially with the principles of 'unity of form' and 'unity of matter' (here proposed in the above Article 1a).

Article 2 — Commencing the initiative

At least five citizens who are entitled to vote in the municipality may form an initiative committee and initiate the process of signature collection by depositing a list of signatures in the office of xxx [the municipal electoral commission].

Article 3 — The list of signatures

The list of signatures shall contain:

a) The title and the wording of the proposal;

b) The beginning and the end of the time available for the collection of signatures;

c) The names and addresses of at least five members of the initiative committee.

d) A clause authorizing the initiative committee to withdraw the initiative.

e) The indication that only those entitled to vote in the municipality are allowed to sign the list and that each person can sign only once.

f) Reference to the penal sanctions contained in Article ***.

Article 4 — Verification of the list of signatures and of the validity of the initiative

[1]Before starting the collection of signatures, the list of signatures shall be presented to the *** [municipal electoral commission].

[2]The *** [municipal electoral commission] shall verify if the formal conditions of Article 3 of these Statutes have been met.

[3]The *** [municipal electoral commission] shall verify the validity of the initiative. It shall declare the initiative invalid after having heard the initiative committee, if:

a) the conditions of Article 1a of these Statutes (principles of unity of form or unity of matter) are not met;

b) the initiative is obviously unlawful (infringement of municipal laws or higher legislation);

c) the initiative is factually impracticable;

d) the initiative instigates public violence and incites racial, linguistic, ethnic, or religious hatred.

[4]The *** [municipal electoral commission] shall communicate its decision to the initiative committee within five days.

Article 5 — Deposit of list of signatures

No later than the working day before the starting date of the collection of signatures, one copy of the list of signatures shall be deposited at the *** [municipal electoral commission]

Article 6 — Publication

The ***[municipal electoral commission] shall publish the text of the initiative, the absolute number of signatures required, the beginning and the end of the time available for collecting signatures and the reference to the relevant provisions on the initiative in these statutes in the *** [official journal].

Article 7 — Collection and verification of the signatures

The signatures shall be collected and verified according to Article *** [= Article 4 of the provisions on the referendum, above at 2.2.2].

2.2.3. Formal requirements and the procedure for conducting the vote in the municipal assembly as well as the peoples' vote

Again, these provisions are very similar to those regarding the referendum. There is, however, a difference insofar as the initiative must be first discussed and voted in the municipal assembly before it can be submitted to the vote of the citizens.

Article 8 — Procedure of initiative

[1]Upon the lapse of the period provided herein, the *** [municipal electoral commission] shall certify as to whether or not the required number of signatures has been obtained in accordance with the law and the statute. The certification shall be published in *** [the official journal].

[2]If the required number of signatures is obtained, the initiative, along with a report of the *** [president of the municipality] on his/her position on the proposal, shall be discussed and voted in the municipal assembly within 60 days from the date of certification by the *** [municipal electoral commission].

[3]If the majority of the councillors present approves the proposal, it shall be adopted.

[4]The decision of the municipal assembly according to paragraph 3 of this Article shall be published in *** [the official journal]. The initiative committee shall be informed directly by the *** [president of the municipal assembly].

In case of a 'citizens' motion', the process ends with this vote and the publication of the response of the municipal assembly (and the respective communication to the initiative committee). In case of a 'real initiative', in contrast, the procedure of the peoples' vote should be conducted, and some additional provisions are needed:

[5]If the municipal assembly rejects the proposal, the *** [president of the municipal assembly] shall call a referendum within 90 days from the decision of the municipal assembly. Failure of the municipal assembly to take a decision according to paragraph 2 of this Article within the period provided herein shall be considered as a rejection of the initiative.

[6]The referendum shall be held on the date fixed by the *** [president of the municipal assembly], after which the results thereof shall be certified and published in *** [the official journal] by the *** [municipal electoral commission].

[7]If the initiative is approved by a majority of the votes cast, provided that more than half of the total number of residents have voted[21], it shall take effect 30 days after certification by the *** [municipal electoral commission] as if it had been taken by the municipal assembly. If it fails to obtain the required number of votes, the initiative shall be considered rejected.

Article 9 — Withdrawal of an initiative

The initiative committee may withdraw the initiative as long as the date for the referendum is not fixed.

Article 10 — Modification of decisions

Any proposal approved by the citizens as provided herein shall not be repealed, modified or amended by the municipal assembly within [12 months] from the date of the referendum.

3. Protection of Electoral Rights for Local Elections

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By its legal nature, the electoral right for the election of organs of a local self-government unit is equal to the electoral right for the election of MPs for the National Assembly of the Republic of Serbia or for the election of the President of the Republic of Serbia. Protected by the Constitution of Serbia and the Constitutional Charter of the State Union of Serbia and Montenegro, i.e. the Charter on Human and Minority Rights, it guarantees the citizens the right to elect their representatives in municipal and city assemblies. The new Law on Local Self-Government expands this right to the direct election and recall of the presidents of municipalities and mayors in those places that, under the Law, have the status of a city.

In terms of the Constitutional Law, the electoral right does not only include the right regulating the conditions and procedure of electing representatives or other organs that are elected directly, but also the right of a citizen to be elected in accordance with certain conditions. It also guarantees that their term cannot end due to reasons not envisaged by the Constitution and the Law if a citizen is elected in accordance with law. It is for this reason that election laws regulate the election and termination of the tenure of MPs and councillors. These laws also include rules that regulate the procedure and organs that protect the electoral right. The Law on Local Elections (*The Official Gazette of the Republic of Serbia*, issue number 33/2002, 37/2002 — correction, 42/2002 and 100/2003 — the decision of the Constitutional Court) regulates the election and termination of tenure of municipal councillors and presidents of municipalities and/or mayors. This Law is of a *lex specialis* character because some provisions of the Law on MPs Election are applied to some issues from the local electoral process. This includes the area or part of the area that refers to: electoral registers; bodies in charge of the implementation of

[21] This second requirement is not very wise in our view but envisaged under of Article 68, para. 3 of the LSG for the referendum. It makes sense to adopt the same system of vote for the instrument of initiative and referendum.

elections; running for office; nomination, identification and announcement of electoral lists; polling stations, informing citizens about the nominees, ban on election propaganda and the announcement of previous results or the forecast of election results; election material; vote, vote-count and the announcement of the election results, etc.

3.1. Who is entitled to protection?

The Law on Local Elections stipulates the way and conditions under which every voter, candidate for councillor or mayor and the person who submits the list of nominated councillors may seek the protection of the rights they are entitled to during local elections. Even though this is not strictly stipulated by the Law, it is our opinion that this protection may also be requested for procedures and actions related to forms of direct citizens' participation in performing the self-government duties such as the referendum and civil initiatives. These may be procedures and actions taken by citizens or their associations in terms of collecting signatures for civil initiatives or for the request for submitting an issue to a referendum. Furthermore, these procedures and actions can also refer to the organization of the referendum, vote-count, etc. All cases are not listed herein. The examples given serve only as an illustration of possible disputed situations that may arise while civil initiatives or referendum are started and that may violate citizens' electoral right.

3.2. Bodies which grant protection

The bodies which secure the protection of the electoral right during local elections are the municipal electoral commission or the city electoral commission and the competent Municipal Court for the territory of the municipality in which the electoral right has allegedly been violated. The principle of the two-level tier in the procedure of protecting the electoral right is also envisaged by the Law on Local Elections, as is the case when electing MPs, the President of the Republic, and the bodies of the State Union. The difference lies in the fact that in the case of local elections court protection is exhausted in the first instance court — the Municipal Court.

3.3. The protection procedure

If they believe that their electoral right or the electoral procedure is violated in general, each of the aforementioned persons (a voter, candidates for a councillor, president of the municipality or mayor, person who submits the list of nominated councillors, person who forwards the request for the recall of the president of the municipality or mayor, person who proposes the referendum, etc.) may file raise an objection in writing to the act or action of other persons or organs of local self-government to the competent municipal electoral commission or electoral commission of the city for the territory of the city. An objection with the electoral commission may also be raised by any member of the electoral committee, but only if the electoral right or election process are violated at a polling station during the very election process.

An objection is raised within 24 hours from the passage of the disputed act, the performance of the disputed action or omission to pass an act or perform an action. This deadline is preclusive and if the objection is raised upon its expiry, the competent electoral commission will dismiss it as untimely. The Law stipulates not only the deadline for raising objections, but also the deadline by which the electoral commission is obliged to render a decision on merits in relation to the objection. The decision is in the form of a formal resolution and is passed within 48 hours from the submission of the objection. Short deadlines are envisaged due to the legislator's wish to speed up the local election process and in order to eliminate any possible doubt in its course. Besides, all procedures for the protection of electoral rights are of an emergency character with very similar short deadlines. This is because in the conflict of two values protected by every legal system — respect for legal security or strict respect for legality — security prevails, or in our case, the certainty of electing local bodies of authority.

If it finds the objection justified, the municipal electoral commission will adopt it and annul the decision or action that was the subject of the objection or order that the act is passed or that the action is taken. The resolution on the objection is delivered to the person who filed it as well as to each of the participants in the election procedure, i.e. the person(s) who submitted the list

of nominated councillors, and the candidate for the president of the municipality or mayor. If the electoral commission fails to render a decision within a 24-hour deadline, the objection will be considered as adopted. The solution that obviates the so-called silence of the administration may give rise to dilemmas in situations where objections are filed because of omissions, i.e. when organs of local self-government fail to act, because it is feared that the organ would not act in accordance with law, i.e. as if the decision of the electoral commission on the objection had been rendered, while in reality it is not rendered but only regarded as adopted.

If the person who filed the objection, or such other person that did not file any objections but as a participant in the elections has a legal interest in the case, is not satisfied with the decision of the municipal electoral commission on the objection, he may institute court proceedings before the competent municipal court by lodging a complaint within 24 hours from the moment of the delivery of the decision of the municipal electoral commission. In the case when the complaint is filed by a person other than the one who raised the objection, a problem arises related to the envisaged deadline of 24 hours — what is the moment when the deadline commences? The most logical solution to the foregoing dilemma is that the electoral commission is obligated to deliver all of its formal resolutions to all those who participate in the election process. In order swiftly to solve the electoral dispute, the deadlines of the electoral commission within which they must act are short. The electoral commission against whose decision the complaint is filed is obliged promptly to furnish the court with all necessary information and documents. This is to be done no later than 12 hours after the complaint is received. On the other hand, the court itself is obligated to rule on the issue a maximum of 48 hours after the receipt of the complaint.

The complaint is decided on by a panel of three judges. In the procedure of electoral right protection, the court applies the rules regulating the proceedings in administrative disputes. This means that the decision is brought on the basis of the written evidence in the chamber, implying that any verbal debate is excluded. The decision of the panel is lawful and final because the law strictly rules out the possibility of re-examination through extraordinary legal instruments, such as the request for extraordinary re-examination of the court's decision and the extraordinary request to repeat the proceedings. The Law on Administrative Procedures already rules out the possibility of the Public Attorney's forwarding a request for the protection of legality, because this legal remedy is applied only against a lawful verdict of the Supreme Court of Serbia, and the protection of the electoral right in local elections does not fall within the jurisdiction of this Court. The decision of the Municipal Court on the complaint lodged produces two different legal situations, depending on whether the Court has granted the complaint against the municipal electoral commission's formal decision dismissing the objection or whether it has granted the complaint against the previously granted objection by the municipal electoral commission. If the Court grants the complaint against the formal decision dismissing the objection, the elections are annulled and are to be repeated no later than 10 days from the day when the court rendered the decision. If the Court adopts the complaint against the previously adopted objection, the decision or action is seen as not annulled by the formal decision of the electoral commission, i.e. the electoral right has not been violated.

It is theoretically possible that the procedure stipulated by the Law does not secure the protection of citizens' electoral right. Bearing in mind that the electoral right is one of those rights guaranteed by the Constitution, the Constitutional Law offers a possibility of seeking seek its protection in the proceedings before the Constitutional Court. In our circumstances, the situation in this case is rather unclear. The Constitution of Serbia does not envisage the filing of a constitutional complaint. At the level of the State Union, such protection is stipulated in the Charter on Human and Minority Rights and the Law on the Court of Serbia and Montenegro. However, this Court has not yet begun to operate, so it is not certain in what way Article 9 of the Charter is to be construed. This Article grants the right to effective court protection to every citizen in case any of their human or minority rights guaranteed by the Charter is violated or denied as well as the right to the elimination of the consequences of such a violation. Under the Article, anybody who feels that any of his human or minority rights guaranteed by the Charter is violated or denied by an individual act or action of an institution of the State Union, the state organ of a member state or organization that exercises its public competencies, may lodge a complaint with the Court of Serbia and Montenegro if no other legal protection in the member state is provided.